

Serial No. 10/032,239

Docket No. 0067.00

- I. Claims 1-20 and 60, drawn to a method of making an antifungal polyene powder;
- II. Claims 21-39 and 60, drawn to a method of making an antifungal polyene powder; and
- III. Claims 40-59, drawn to an antifungal powder composition.

The Examiner has further required election of the solvent (with respect to Groups I and II) as well as the polyene compound (with respect to Groups I, II and III).

II. Response to the Restriction Requirement:

In response, Applicants hereby elect: Group III, claims 40-59, *with traverse*, and amphotericin as the polyene compound, *with traverse*. No election of the solvent is made since the Examiner appears to have required election of a solvent only with respect to Groups I and II. The claims that are readable upon these elections are claims 40-59.

Traverse is premised on the ground that a combined search of all three Groups and the polyene compound, as well as the specific solvents does not impose an undue burden on the Examiner. As stated in the Manual of Patent Examining Procedure (M.P.E.P.),

[i]f the search and examination of an entire application can be made without serious burden, the examiner must examine it on the merits, even though it includes claims to independent or distinct inventions.

See M.P.E.P. Section 803.

Here, although the method of Group I employs a solution and the method of Group II employs a suspension, both Groups I and II are nevertheless directed to a method of making certain compositions. In addition, all three Groups have been classified in the same way (i.e., each Group has been assigned to class 424, subclass 489 and 405).

In addition, with respect to requirement to elect a specific solvent and polyene antifungal, Applicants emphasize that the claims recite elements (e.g., dry powders, spray drying, and so forth) that can be easily searched to narrow amount of relevant prior art the Examiner must consider. Once the prior art is narrowed in this way, Applicants believe that a search for all solvents and polyene antifungals within the remaining relevant prior art can be performed without imposing an undue burden on the Examiner.

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As a consequence, examination of all of the claims at one time does not pose a serious burden to the Examiner. Consequently, reconsideration and removal of the requirements for restriction are respectfully requested.

III. Conclusion:

In view of the foregoing, Applicants submit that the pending claims satisfy the requirements of patentability and are therefore in condition for allowance. Consequently, a prompt mailing of a Notice of Allowance is earnestly solicited.

If a telephone conference would expedite the prosecution of the subject application, the Examiner is requested to call the undersigned at (650) 620-5506.

Respectfully submitted,
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